

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

JUL 21 2011

Federal Communications Commission
Office of the Secretary

In re)	
)	
MARITIME COMMUNICATIONS/LAND	)	EB Docket No. 11-71
MOBILE, LLC	)	File No. EB-09-IH-1751
	)	FRN: 0013587779
Participant in Auction No. 61 and Licensee of)	
Various Authorizations in the Wireless Radio)	
Services)	
)	
Applicant for Modification of Various	)	Application File Nos. 0004030479,
Authorizations in the Wireless Radio Services	)	0004144435, 0004193028, 0004193328,
	)	0004354053, 0004309872, 0004310060,
Applicant with ENCANA OIL AND GAS (USA),	)	0004314903, 0004315013, 0004430505,
INC.; DUQUESNE LIGHT COMPANY; DCP	)	0004417199, 0004419431, 0004422320,
MIDSTREAM, LP; JACKSON COUNTY	)	0004422329, 0004507921, 0004153701,
RURAL MEMBERSHIP ELECTRIC	)	0004526264, 0004636537,
COOPERATIVE; PUGET SOUND ENERGY,	)	and 0004604962
INC.; ENBRIDGE ENERGY COMPANY,)	
INC.; INTERSTATE POWER AND LIGHT)	
COMPANY; WISCONSIN POWER AND)	
LIGHT COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE – MID CONTINENT, LLC;)	
DENTON COUNTY ELECTRIC)	
COOPERATIVE, INC. , DBA COSERV)	
ELECTRIC; AND SOUTHERN CALIFORNIA)	
REGIONAL RAIL AUTHORITY)	

To: Marlene H. Dortch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

ENFORCEMENT BUREAU'S CONSOLIDATED COMMENTS
ON
PROCEDURES FOR THE PARTICIPATION OF MR. HAVENS

1. By Order, FCC 11M-15 (ALJ, rel. June 16, 2011), the Presiding Judge established a procedural schedule for, among other things, the filing of pleadings related to the future

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participation in this hearing of Warren Havens and several entities he controls.¹ Specifically, the Presiding Judge directed the Enforcement Bureau (“Bureau”) to submit its consolidated comments on filings by (a) Maritime Communications/Land Mobile, LLC (“Maritime”);² (b) by the proposed assignees in applications that were designated for hearing in this case;³ and (c) by Mr. Havens.⁴ The Bureau hereby submits its consolidated comments.

2. By way of background, the Commission commenced the above-captioned hearing proceeding with its release of *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, FCC-11-64, rel. April 19, 2011 (“HDO”). The HDO raised material and substantial questions about the qualifications of Maritime to be and remain a Commission licensee. The HDO also designated for hearing a number of pending assignment applications in which Maritime was the proposed assignor. As a consequence and as required by statute,⁵ the HDO afforded the Proposed Assignees full party status because of their direct interest in the disposition of these applications.

3. The HDO observed that Mr. Havens also had a direct interest in the disposition of the pending assignment applications – and thus was a party-in-interest in the instant hearing –

¹ These consist of Environmental LLC, Intelligent Transportation and Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, Verde Systems LLC and V2G LLC (collectively, “Mr. Havens”).

² See Motion Proposing Procedures for Participation of the Petitioner Parties, filed on June 29, 2011, by Maritime (“Motion”).

³ See Comments on Maritime’s Motion, filed on July 8, 2011, by Atlas Pipeline Mid-Continent, LLC, DCP Midstream, LP, Denton County Electric Cooperative, Inc. d/b/a CoServ Electric, Dixie Electric Membership Corporation, Inc., Duquesne Light Company, Enbridge Energy Company, Inc., EnCana Oil & Gas (USA) Inc., Interstate Power & Light Company, Jackson County Rural Electric Membership Cooperative, Southern California Regional Rail Authority, and Wisconsin Power and Light Company (collectively, “Proposed Assignees”).

⁴ See Opposition to Maritime’s Motion, filed on July 14, 2011, by Mr. Havens.

⁵ See Section 309(e) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 309(e).

because he had petitioned to deny the applications. Accordingly and as required by statute,⁶ the Commission ordered that each entity controlled by Mr. Havens “shall be made parties to this hearing in its capacity as a petitioner to one or more of the captioned applications.”⁷ In affording Mr. Havens and the Proposed Assignees the opportunity to participate in the instant hearing, the Commission did not differentiate their status, rights, and obligations as parties from those of any other party in the case, including the Bureau and Maritime. Indeed, the Commission did not distinguish one party from another or limit in any way the participation of any particular party in any phase of the hearing.

4. Nevertheless, both Maritime and the Proposed Assignees request that the Presiding Judge take the extraordinary action of imposing significant restrictions on Mr. Havens’ capacity to exercise his rights as a party in this case. Specifically, they have proposed severe limitations on Mr. Havens’ ability to take discovery, to submit direct case exhibits, to participate in the trial, and to offer proposed findings of fact and conclusions of law. As discussed below, the Bureau believes that the proposals to limit Mr. Havens’ participation could adversely impact the Bureau’s ability to obtain timely discovery, to build a complete record, and to prepare its case for hearing. Accordingly, the Bureau opposes efforts to curtail Mr. Havens’ participation or to effectively create a tiered party mechanism in this hearing.⁸

Mr. Havens’ Participation In The Discovery Process

5. During the pre-hearing conference, the Presiding Judge refused to segregate issue (j) in the HDO – essentially nothing more than an issue of law – from other issues in the HDO

⁶ *Id.*

⁷ See HDO at ¶ 72.

⁸ The Bureau also is concerned that Maritime’s and the Proposed Assignees’ proposals, if effectuated, could be construed as unwarranted sanctions against Mr. Havens (who has not even been alleged to have engaged in any misbehavior in the course of this hearing) and could form the basis for a finding of reversible error. Any remand of this case would necessarily delay the outcome of the hearing, a result manifestly inconsistent with the public interest.

for the purposes of discovery.⁹ Nonetheless, Maritime proposes a “modified bifurcation” that limits Mr. Havens’ written discovery requests and deposition questioning to just issue (j). Stated otherwise, Mr. Havens would be limited to discovery directed only to the issue of whether, “in light of the foregoing issues . . . the captioned applications filed by or on behalf of [Maritime] should be granted.”¹⁰ The Proposed Assignees support Maritime’s proposal, arguing that Mr. Havens has “no right to seek discovery of the Applicants” relating to any other issues in the HDO.¹¹ Maritime’s proposal is premised on its mistaken interpretation of the HDO as “clearly” limiting the scope of both Mr. Havens’ status and participation to issue (j).¹² Maritime does not cite to any language in the HDO that supports a “clear” limitation – or any limitation, for that matter – of Mr. Havens. Furthermore, neither Maritime nor the Proposed Assignees cite to any language in the HDO or to any Commission Rule that deprives Mr. Havens of the full rights enjoyed by any other party in this proceeding.

6. Instead, Maritime and the Proposed Assignees appear to rely solely on the Presiding Judge’s authority under Section 1.243(f) of the Commission’s Rules to “[r]egulate the course of the hearing,” and to exclude any person engaging in contemptuous or disruptive conduct; his authority under Section 1.243(i) to dispose of procedural matters; and his authority under Section 1.311(c)(3) to determine the use of discovery procedures. While the Presiding Judge unquestionably has discretion over the course of this hearing and may impose sanctions on parties for disruptive behavior, neither Maritime nor the Proposed Assignees provide any legal

⁹ See, e.g., Transcript of Pre-Hearing Conference, dated June 15, 2011, at pp. 53-55, 59-60, and 63-66.

¹⁰ See HDO at ¶ 62(j).

¹¹ See Proposed Assignees’ Comments on Maritime’s Motion at 2. To the extent that both Maritime and the Proposed Assignees wish to have the pending applications granted, they are ideologically aligned in this hearing. Thus, it is not surprising that Maritime and the Proposed Assignees would concur in any efforts to curtail or forestall Mr. Havens from participating fully in this hearing.

¹² See Motion at 2-3.

justification for how any of the Commission Rules on which they rely authorize the Presiding Judge to preclude entities whom the Commission has afforded full party status from fully participating in the hearing. Indeed, pursuant to Section 1.243(f), the Presiding Judge's authority to remove any party from the hearing (and otherwise restrict their full participation therein) is limited to only those circumstances where the party is "engaging in contemptuous conduct or [is] otherwise disrupting the proceedings."¹³ Mr. Havens has been accused of no such conduct or disruption here. For these reasons, the Bureau respectfully requests that the Presiding Judge reject Maritime's proposal to limit Mr. Havens' discovery requests to issue (j).¹⁴

7. Maritime's and the Proposed Assignees' apparent concerns about duplicative discovery by Mr. Havens are exaggerated and without merit. As is customary in any multi-party hearing, it is incumbent upon all of the parties to coordinate with each other in conducting discovery to ensure that this important phase of the hearing is carried out efficiently and is not overly burdensome. Indeed, in this regard, the Bureau has always intended to coordinate with Mr. Havens and other parties concerning the taking of depositions, including the selection of mutually agreed-upon dates, the order of examination, and the questioning of witnesses. Placing restrictions on a party's ability to conduct legitimate discovery, however, goes too far.

8. Maritime's proposal that a party answering discovery requests be allowed to submit a consolidated response that covers both the Bureau's initial requests and any additional, yet non-duplicative requests Mr. Havens may serve within seven days after the Bureau's requests is unmanageable, unnecessary, and contrary to the public interest.¹⁵ If Maritime's proposal were effectuated, the Bureau would not receive responses to its written discovery requests until at least

¹³ 47 C.F.R. § 1.243(f).

¹⁴ On these same grounds, the Presiding Judge should also reject Maritime's proposal to restrict Mr. Havens' ability to question trial witnesses, introduce direct case exhibits and testimony, and submit proposed findings and conclusions of law about any issues other than those relevant to issue (j). See Motion at 5.

¹⁵ See Motion at 3-4.

seven days after the time otherwise allowed by the Commission's Rules. There is absolutely no basis – and Maritime offers none – for denying the Bureau a timely response to discovery requests it has properly served. Indeed, if the discovery requests are not duplicative, as they should not be, there is no efficiency gained by allowing Maritime or any other party to serve a delayed joint response.¹⁶ Any delay in receiving Maritime's or the Proposed Assignees' responses to the Bureau's discovery requests necessarily would impede the Bureau's ability to serve additional discovery or to take depositions that rely on such responses. Thus, with just under six months left in the discovery period (which include the Thanksgiving, Christmas and New Year holidays), imposing an additional seven-day delay, at a minimum, for each written discovery request the Bureau serves will seriously jeopardize its ability to build a thorough record within the proscribed discovery period. Accordingly, the Bureau requests that the Presiding Judge reject Maritime's proposal.¹⁷

9. The Presiding Judge should also reject the Proposed Assignees' suggestion that Mr. Havens submit his written discovery requests to the Bureau for consideration, and if the Bureau deems such requests appropriate, the Bureau should then pursue the discovery. The Commission's Rules specifically leave to the presiding officer the responsibility of determining the appropriateness of any parties' discovery requests.¹⁸ Allowing the Bureau to act as a "filter" on Mr. Havens' discovery would essentially place the Bureau in the position of usurping rights

¹⁶ Moreover, Maritime has already sought a nearly three and a half week extension for responding to just the Bureau's interrogatories and document requests. *See* Maritime's Motion for Extension of Time to Respond to the Enforcement Bureau's Initial Discovery Requests, filed July 15, 2011. If Maritime is faced with responding to multiple sets of discovery requests at one time, how many more such motions for extension should we expect it to file?

¹⁷ There is no basis for restricting the Bureau's access to legitimate discovery. Indeed, there is nothing in the record to suggest that the Bureau has exceeded – or will exceed – its authority under Section 1.311 of the Commission's Rules, 47 C.F.R. § 1.311, to seek discovery of those matters which are relevant to any of the issues designated for hearing or which appear reasonably calculated to lead to the discovery of admissible evidence.

¹⁸ *See, e.g.*, Sections 1.313, 1.315(c), 1.315(d)(2), 1.323(d) and 1.325(a)(2) of the Commission's Rules, 47 C.F.R. §§ 1.313, 1.315(c), 1.315(d)(2), 1.323(d) and 1.325(a)(2).

reserved for the Presiding Judge. Moreover, it places an unnecessary burden on the Bureau, which is preparing its own case, to review Mr. Havens' requests and its own.¹⁹ For these reasons, the Presiding Judge should reject the Proposed Assignees' proposal.

10. The proposed discovery restrictions on Mr. Havens appear to be nothing more than Maritime's and the Proposed Assignees' premature attempt to insulate themselves now from some perceived, if not speculative, burden they believe they may incur later in responding to Mr. Havens' discovery requests. If Maritime and the Proposed Assignees object to the Mr. Havens' discovery requests as somehow overreaching or excessive, the Commission's Rules already provide more than sufficient protections and recourse.²⁰ It is unnecessary for the Presiding Judge to impose draconian limits on Mr. Havens – at the expense of the Bureau's ability to obtain timely discovery responses and develop a thorough record – at this early stage of the proceedings.²¹

Mr. Havens' Participation In the Trial

11. Maritime further suggests that only the Bureau and Maritime should exchange direct case exhibits on February 3, 2012, the date set forth for such exchanges in the Presiding Judge's June 16, 2011 Order, and that within 10 days thereafter – or by February 13, 2012 – both the Proposed Assignees and Mr. Havens may request leave of the Presiding Judge to offer supplemental evidence. This proposal, too, would create a "Rube Goldberg" process that is simply unwarranted. It would mean that none of the parties to the hearing can be sure of the

¹⁹ While the Bureau and Mr. Havens may share some common goals in this case, their interests are for obvious reasons not completely aligned, as Maritime and the Proposed Assignees seem to suggest. Thus, the nature and scope of discovery in which the Bureau and Mr. Havens engage may very well differ.

²⁰ See, e.g., Sections 1.323(b), 1.315 (b) and 1.313 of the Commission's Rules, 47 C.F.R. §§ 1.323(b), 1.315 (b) and 1.313.

²¹ This is especially true in light of the Petitioner Parties' agreement to be limited in the number of interrogatories and depositions it would seek of the Applicant Parties. See Opposition at 10-11.

evidence that will be offered at trial until the Presiding Judge rules on both the Proposed Assignees' and Mr. Havens' motions. This necessarily jeopardizes the parties' ability to meet the February 13, 2012 deadline for Witness Notification and to engage in a meaningful Evidence Admissions Session as scheduled on February 27, 2012. It will also undoubtedly delay the trial date, set to begin on March 20, 2012. Notably, Maritime offers no explanation for why such a multi-step procedure is even necessary or any legal support for imposing such a distinction between Maritime and the Bureau, on the one hand, and Mr. Havens and the Proposed Assignees, on the other. Maritime also fails to substantiate its proposal that only Maritime and the Bureau should fully participate in the actual trial. The primary goal of a trial is to ensure that a full and complete record is established; this can hardly occur if both Mr. Havens and the Proposed Assignees are precluded from participating in anything but a limited role. For these reasons, the Bureau requests that the Presiding Judge also reject these proposals.

The Proposed Assignees' Participation Should Not Be Limited

12. Lastly, it would appear that both Maritime and the Proposed Assignees have used their briefing concerning limits on Mr. Havens as an additional opportunity to argue for limiting the Proposed Assignees' responsibility to respond to discovery *from the Bureau*. In particular, Maritime argues (and the Proposed Assignees apparently agree) that the HDO limits the Proposed Assignees' status and participation to issue (j), suggesting that all parties, including the Bureau, should be precluded from seeking any discovery from the Proposed Assignees concerning any issue other than issue (j).²² Yet, as described above in connection with Mr. Havens, the HDO provides no such limitation. Moreover, the Proposed Assignees already moved for bifurcation and/or protection from discovery seeking this very same limitation – and

²² See Motion at 2-3 and fn 2.

lost.²³ In accordance with the Presiding Judge's instructions at the pre-hearing conference, the Bureau and the Proposed Assignees have already presented competing proposals to the Presiding Judge concerning the scope of discovery the Bureau may serve on the Proposed Assignees.²⁴ Any attempt to circumvent that process here is inappropriate.

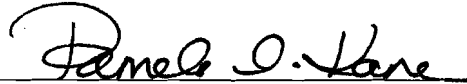
13. Based on the foregoing, the Bureau opposes the proposals to limit Mr. Havens' ability to take discovery, to submit direct case exhibits, to participate in the trial, and to offer proposed findings of fact and conclusions of law. Specifically, the Bureau opposes the proposals (i) to limit Mr. Havens' participation in discovery and at trial to only issue (j); (ii) to allow the answering party to submit consolidated responses to written discovery seven days later than would be allowed by the Commission's Rules; (iii) to impose upon the Bureau the responsibility of reviewing Mr. Havens' discovery requests; and (iv) to preclude the full participation of both Mr. Havens and the Proposed Assignees in the pre-trial process and at trial. The Bureau also opposes limiting the Proposed Assignees' discovery obligations, as they pertain to the Bureau's requests, to issue (j).

²³ See, e.g., Transcript of Pre-Hearing Conference, dated June 15, 2011, at pp. 49, 55-56, and 66.

²⁴ See Enforcement Bureau's Status Report Concerning Discovery, filed June 27, 2011, and the Amended Stipulation Status Report, filed on June 30, 2011, by the Proposed Assignees.

Respectfully submitted,

P. Michele Ellison
Chief, Enforcement Bureau

A handwritten signature in black ink, reading "Pamela S. Kane", written over a horizontal line.

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July 21, 2011

CERTIFICATE OF SERVICE

Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 21st day of July, 2011, sent by first class United States mail, copies of the foregoing "ENFORCEMENT BUREAU'S CONSOLIDATED COMMENTS ON PROCEDURES FOR THE PARTICIPATION OF MR. HAVENS" to:

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